WILLIAM B. TORGRAMSEN
ROSEMARY LUDVICK
v.
HEIRS AND DEVISEES OF
CARL G. CARLSON

IBLA 85-779 Decided March 19, 1987

Appeal from an order issued by Administrative Law Judge John R. Rampton, Jr., dismissing a private contest complaint against Native allotment AA-7941.

Affirmed.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Generally -- Color or Claim of Title: Generally -- Contests and Protests: Generally

Sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5) (1982), established a specific time limitation for raising objections to the approval of designated Native allotment applications. Pursuant to this statute a private contest of a Native allotment, based on a claim under the Color of Title Act, filed more than 180 days following enactment of ANILCA, must be dismissed.

APPEARANCES: Sharon L. Gleason, Esq., Anchorage, Alaska, for appellants; David P. Wolf, Esq., Erik Le Roy, Esq., Anchorage, Alaska, for appellees.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

William B. Torgramsen and Rosemary Ludvick appeal from an order of Administrative Law Judge John R. Rampton, Jr., dated April 23, 1985, dismissing appellants' private contest complaint against the Native allotment application filed by Carl G. Carlson (AA-7941) for lands in sec. 35, T. 56 S., R. 74 W., Seward Meridian, Alaska. 1/ Judge Rampton found appellants had

1/ The land is described in the complaint as follows:
"Section 35, Township 56 South, Range 74 West, Seward Meridian; point of beginning is where a small unnamed stream spills into Popov Strait south of Ben Green Bight, thence +/- 40 chains westerly to Corner No. 2; thence

failed to file a protest prior to the deadline for filing set forth in sec. 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1982), and therefore lacked standing to bring the action.

Appellants' complaint filed June 26, and appellees' answer filed November 7, 1983, provide a background for this controversy. Judge Rampton summarized this background in his order as follows:

> Contestants' allegations in the complaint include a claim of title to the land by deed dated March 3, 1969, from Dan Kristensen, who had purchased it from the estate of Ingval Thompson. Ingval Thompson acquired the land from Ingvold Kvolik by some unknown manner or conveyance, and Ingvold Kvolik had purchased the land from Jennie Soberg. It was not stated how or by what manner Jennie Soberg had acquired the land in issue.
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> In 1969, Torgramsen applied for the land under section 14(h)(5) of Alaska Native Claims Settlement Act (ANCSA). The application was denied on technical grounds and it was suggested he apply under Section 14(c)(1) of ANCSA.
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> On November 5, 1971, Carl G. Carlson filed an allotment application for 160 acres, including the land involved in this action. After a field examination in May 1976, the land claimed was reduced to exclude certain buildings claimed by others. Later, a part of the excluded portion was restored and his application approved in 1978.
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> The complaint alleges that Carlson was not a Native Alaskan and had never used the land to the exclusion of others as required by 43 CFR § 2561.0-5(a) and that in fact William Torgramsen, his family and their predecessors in interest, Native Alaskans, have held color-of-title to the land in issue since the 1920s, and that since purchasing the land in 1969 contestant had used the land openly and notoriously by visiting it a dozen or more times each year for clam digging, fishing, picking rhubarb and berries, hunting for ptarmigan, picking sea eggs and bidarkis.
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> It was further alleged that the use by the Torgramsen family segregated the land from appropriation until December 18,

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fn. 1 (continued)
+/- 20 chains northerly to Corner No. 3 located on the southerly bank of an unnamed stream; thence +/- 25 chains meander the unnamed stream easterly to Corner No. 4; thence +/- 5 chains northwesterly to Corner No. 5 located on the mean high tide line of the bay created by Ben Green Bight; thence meanders easterly to and around the small bay to a point where the east/west portion of the bight reached the north/south portion; thence south to the mean high tide line of the southern shore of the bight; thence meanders in a southerly direction to the point of beginning."

1971, when its occupancy rights conferred by protective statutes were repealed by Section 4 of ANCSA, and that the lands in dispute were simultaneously withdrawn under Section 11 of ANCSA and the Torgramsen family became entitled to a 14(c)(1) conveyance subject to right of selection of the land by the Shumagin Native Corporation.

Contestants' primary reliance for standing to bring this action was based on a purported series of deeds, with one break in chain of title from 1927 to present. It was stated that although the original title is not known, the title would be produced and the missing link in the chain would be brought forth in the course of the proceedings. In the event they were unable to establish the specific federal act upon which the title is based, they would rely upon the Color of Title Act, 43 U.S.C. § 1068 (1975).

The contestee filed a timely answer admitting the recitation of facts as to the application by Carl G. Carlson. It was admitted that the Shumagin Corporation did file a selection application on November 24, 1974; that an interim conveyance was issued on September 13, 1978, excluding the lands claimed in Carlson's Native Allotment; that an interim conveyance of the subsurface estate, excluding the Carlson Allotment, was issued to the Aleut Corporation; and that the State of Alaska filed a selection application for the lands on November 14, 1978.

Each and every other allegation was denied.

In affirmative defense, contestee alleged that contestants have never occupied the land in issue, and cannot receive title to the land in dispute even if they prevail and therefore have no standing to bring this action. Additionally, it was stated that contestants failed to timely appeal the decision to grant Carlson's Native Allotment Application; that they do not qualify for a 14(c)(1) ANCSA conveyance; that they are barred by laches and have waived their claim to the land.

A hearing was scheduled for September 12, 1984, at Sand Point, Alaska, but on August 6, 1984, appellees filed a motion to dismiss the complaint. The basis for the motion was that all pending Alaska Native allotment applications were legislatively approved by Congress pursuant to 43 U.S.C. § 1634 (1982), and as a result allotment applications became nonjusticiable unless a protest was filed on or before May 31, 1981, pursuant to 43 U.S.C. § 1634(a)(5). Appellees contended that appellants lacked standing to bring this action because no protest had been filed before this date, and appellants were therefore precluded from filing a complaint against Carlson's entry.

On August 21, 1984, appellants filed a memorandum in opposition, stating that appellees' application was not eligible for automatic approval under ANCSA, because appellants possessed valid existing rights in the land which entitled them to be heard at a private context proceeding.

On August 23, 1984, appellees filed a reply memorandum in support of their position that 43 U.S.C. § 1634 (1982), legislatively approved all Alaska Native allotments pending on or before December 18, 1971, on lands that were unreserved on December 13, 1968. The hearing set for September 12 was vacated on August 29, 1984, and a prehearing conference was held in Anchorage, Alaska, on September 12, 1984, during which the parties presented oral arguments on the motion to dismiss. The order scheduling the prehearing conference stated: "On preliminary review it appears that the motion should be granted unless the contestants can show, not only prior use and occupancy, but evidence of record title and/or application for title predating the application of Carl G. Carlson." At the prehearing conference, counsel for both parties submitted supplemental briefs in support of their positions.

In his decision rendered following the September 12, 1984, prehearing conference Judge Rampton found that:

> Except for the submission of the complete file of the Shore Fisheries Lease Application in the name of William Torgramsen, the contestant has failed to submit any documentation record title and/or application for title predating the application of Carl G. Carlson. No assertion is made that the Fisheries Lease Application can serve as a substitute for a title application. At best, I find it is corroborative evidence that Torgramsen claimed use and ownership of the land abutting his fishing sites.
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> No additional affidavits supporting the Torgramsen family's use and occupancy have been submitted as promised. Contestants rely on the affidavits, Exhibits M, N, and O, attached to their complaint as prima facie evidence to establish sufficient interest in the land to challenge the Carlson application.

(Order at 6).

Judge Rampton concluded that, because appellants had not alleged that they, their family, or predecessors in interest were in possession of the land at the time of the passage of the acts under which they assert title, they could not assert any right of title by reason of subsequent use and occupancy. He also found ANCSA expressly extinguished all aboriginal title and, therefore, prior use and occupancy by Alaskan Natives does not serve to sever the public lands from vacant and unreserved status. He explained that only those titles to lands held by Natives as a primary place of residence and to lands claimed under the Native Allotment Act pursuant to application pending on December 18, 1971, were protected.

From the evidence submitted to him, Judge Rampton found contestants never claimed the land as a primary residence and there was no Native allotment application of record pending before the Department. Based upon the above findings, Judge Rampton concluded that any rights acquired by appellants, based on use and occupancy had been extinguished and that no protest to Carlson's application had been filed prior to the May 31, 1981, statutory deadline.

Judge Rampton then held appellants' aboriginal rights, if any, to the land embraced in the Carlson application were extinguished by appellants' failure to file a timely protest, and appellants lacked the necessary standing and interest to bring the action. Judge Rampton then granted the motion to dismiss and dismissed the complaint. As a result, no hearing on the merits was held.

In their statement of reasons, Torgramsen and Ludvick contend they have presented evidence showing valid existing rights to the land in issue, making summary approval of Carlson's application for the land inappropriate. Appellants contend that section 905 of ANILCA precludes summary approval of allotment applications when valid existing rights to the land are presented, and argue their claim under the Color of Title Act constitutes a valid existing right.

Appellants state their predecessors' use and occupancy of the land removed it from unreserved status, making it unavailable for summary allotment approval. Appellants next contend that their entitlement to an allocation of land under section 14(c)(1) of ANCSA, 43 U.S.C. § 1613 (c)(1) (1982) or to a patent under 43 U.S.C. § 1068 (1982) is sufficient to confer standing. Appellants also contend that Carlson's allotment application was not made pursuant to the Native Allotment act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), because Carlson's application was not made for vacant, unappropriated and unreserved land as required by that Act. Therefore, appellants assert that it is not subject to legislative approval under ANILCA.

Finally, appellants cite provisions of the Act of May 14, 1898, 30 Stat. 409, allowing no entry under the public land laws to extend more than 160 rods along the shore of any navigable water, and contend the limitation is applicable to entries under the Allotment Act because ANILCA did not alter that statutory requirement. Based upon this allegation, appellants contend that, even if the application is subject to legislative approval, the question of the 160-rod limitation was properly raised and must be addressed at a hearing.

In response, appellees contend that section 905 of ANILCA, 43 U.S.C. § 1634 (1982), precludes appellants' claims, and that appellants' color of title claim is not a valid existing right. Appellees contend appellants do not have standing under 43 U.S.C. § 1613(c)(1) (1982), because under this section a Native village corporation must hold patent to the land. Appellees state the village corporation did not protest Carlson's application, and it therefore would have no standing to oppose summary approval of appellees' allotment application. Therefore, appellees contend that, if the village has no standing, appellants can have no standing based on the village corporation's rights. Appellees assert that appellants have not made a proper claim under the Color of Title Act in that they have not met the statutory requirements of that Act. In addition, appellees assert that appellants have not met the regulatory requirement by filing an application. 2/

2/ Both parties filed reply briefs which essentially reiterate the arguments in the statement of reasons and answer. Appellants filed a motion to strike appellees' reply briefs. 43 CFR 4.414 provides that if additional briefs are filed by appellant, the adverse party shall have an opportunity to answer. Therefore, appellants' motion is denied.

[1] A brief review of the pertinent legislation applicable to Native allotments may prove helpful. Judge Rampton found Carlson's Native allotment application to have been filed on November 5, 1971, under the Native Allotment Act, as amended, supra, and the parties do not dispute this holding. This Act granted the Secretary of the Interior authority to allot "in his discretion and under such rules as he may prescribe" up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Indian, Aleut, or Eskimo of full or mixed blood who resides in Alaska and is the head of a family or 21 years of age. 43 U.S.C. § 270-1 (1970). Entitlement to an allotment was dependent upon satisfactory proof of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3 (1970).

The Native Allotment Act was repealed on December 18, 1971, by section 18 of ANCSA, 43 U.S.C. § 1617 (1982), but those applications pending before the Department on the date of repeal were allowed to proceed to patent.
Subsequently, section 905(a)(1) of ANILCA provided that, with certain exceptions, pending applications for land "unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following December 2, 1980." 43 U.S.C. § 1634(a)(1) (1982). Among the exceptions, section 905(a)(5)(C) provides that the legislative approval does not apply if, within the specified 180 days: "A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity." 43 U.S.C. § 1634(a)(5)(C) (1982).

In order to create a section 905(a)(5)(C) (1982) exception which would preclude the automatic legislative approval of an application pursuant to 905(a)(1), three prerequisites must be met. First, a protest must be filed; second, the protest must have been filed within the 180-day deadline established by section 905(a)(1); and third, the party filing the protest must allege and, if necessary, demonstrate that improvements exist on the land. Eugene M. Witt, 90 IBLA 330, 333 (1986).

We are immediately faced with the fact that there is no evidence of a protest having been filed within the time specified by section 905(a)(1). Therefore, we find the appellants' 43 CFR 4.450-1 contest complaint filed on June 26, 1983, to be untimely. Section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1982), was intended to promote allotment and conveyance finality. S. Rep. No. 413, 96th Cong., 2nd Sess. 237, reprinted in, 1980 U.S. Code Cong. & Ad. News 5181. The intent of that section would be frustrated by allowing appellants to come forward after the statutorily imposed time limit and attempt to defeat allotments legislatively approved by ANILCA. State of Alaska v. Heirs of Dinah Albert, 90 IBLA 14, 20 (1985). The language of ANILCA would have allowed the appellants to file a private contest or a protest within the statutory period. When appellants failed to do so they were barred from challenging the validity of Carlson's Native allotment application. See State of Alaska v. Heirs of Dinah Albert, supra at 20.

Section 905(e), 43 U.S.C. § 1634(e) (1982), cannot now be invoked to save the contest from dismissal. Section 905(e) provides:

> Prior to issuing a certificate for an allotment subject to this section, the Secretary shall identify and adjudicate any record entry or application for title made under an Act other than the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], the Alaska Statehood Act, or the Act of May 17, 1906, as amended, which entry or application claims land also described in the allotment application, and shall determine whether such entry or application represents a valid existing right to which the allotment application is subject. Nothing in this section shall be construed to affect rights, if any, acquired by actual use of the described land prior to its withdrawal or classification, or as affecting national forest lands.

Section 905(e), relates specifically to identification and adjudication of "any record entry or application for title." There is no evidence of appellants having filed an application under the Color of Title Act, 3/ or that a record entry was made identifying their claim. Therefore, we find section 905(e) to be inapplicable in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge dismissing the contest is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member.

3/ In any event, we find that appellants have not submitted sufficient evidence to meet the requirements of the Color of Title Act. 43 U.S.C. § 1068 (1982). In order to satisfy the statutory requirements set forth in 43 U.S.C. § 1068 (1982), appellants must establish a claim of title of more than 20 years based on instruments which on their face purport to convey the land in issue. Jerome L. Kolstad, 93 IBLA 119 (1986); Carmen M. Warren, 69 IBLA 347, 349 (1982). Appellants are unable to account for either the origin of Jennie Soberg's title or the passage of title from Invold Kvolik to Invold Thompson. A color-of-title application will be rejected when appellants fail to produce the necessary documentation. The obligation for proving a valid color-of-title claim is upon the applicant. A failure to carry the burden of proof with respect to any one of the elements for a color-of-title claim is fatal to the application. Middle Rio Grande Conservancy District, 86 IBLA 41 (1985).